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Supreme Court of the United States

OCTOBER TERM, 1968.

No. 340

LUCIUS J. BREELAND,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, IN No. 24,634 OF THE DOCKET OF SAID COURT.

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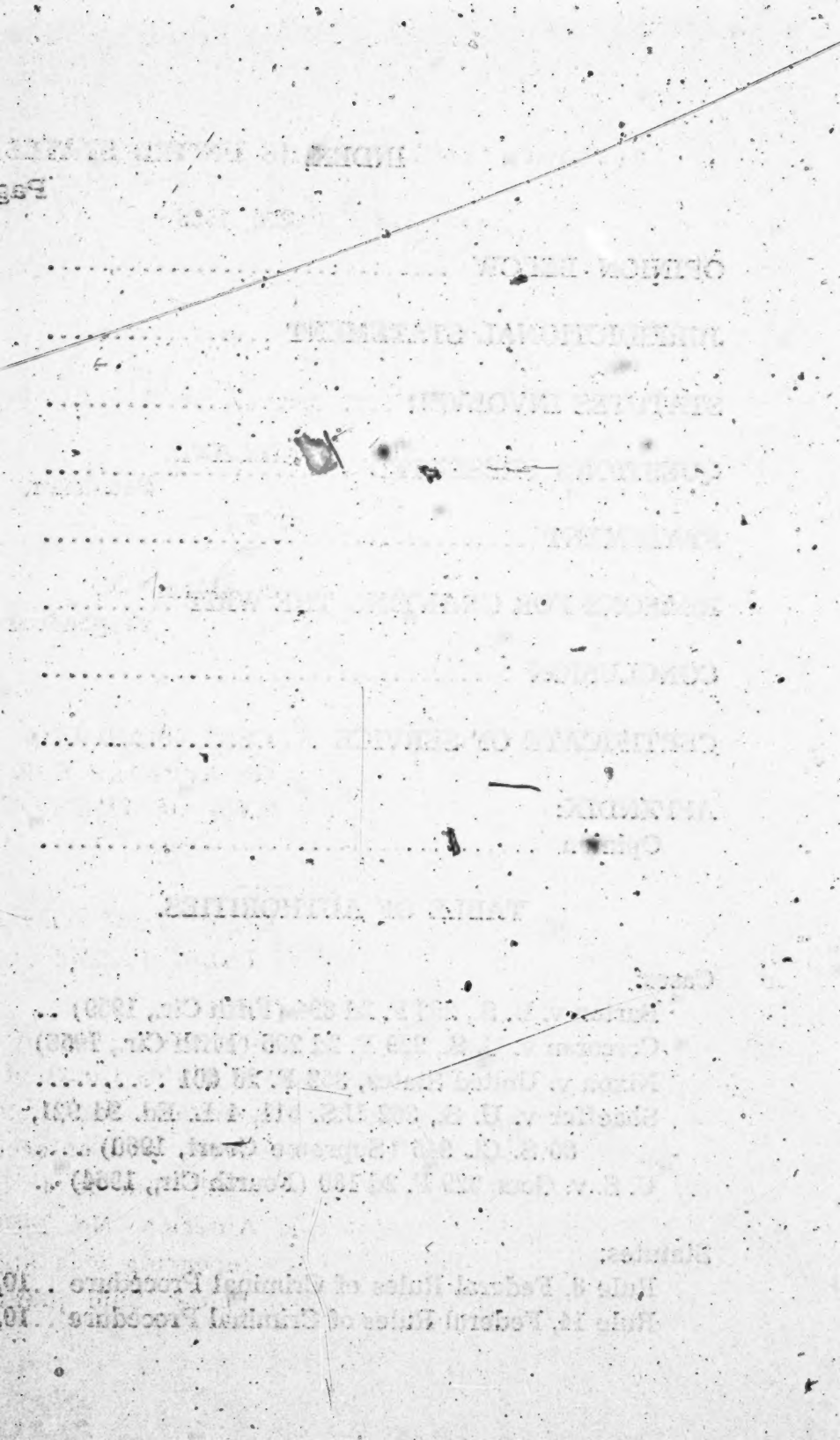

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, IN No. 24,634 OF THE DOCKET OF SAID COURT.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Lucius J. Breeland, prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review the judgment and opinion of that Court rendered and entered on June 25, 1968 in the case entitled "Lucius J. Breeland versus United States of America, No. 24634 of the Docket of said Court. No rehearing was applied for, for the reasons assigned below. Said judgment

was an affirmance of a conviction and sentence of three years imprisonment in a mail fraud prosecution in which sentence of three years was imposed, concurrently on multiple counts.

OPINION BELOW.

The opinion below is as yet unreported but is printed in the Appendix made part of this application and a copy of said opinion appears likewise in the certified copy of the record filed herewith.

JURISDICTIONAL STATEMENT.

The opinion and judgment below were entered on the same date, June 25, 1968. No rehearing was applied for, hence the delay for filing this application commenced with the date of entry of judgment and of said opinion.

This case involved prosecution of violations of 18 USCA, Secs. 1341 and 1342, hence this is an appealable Federal criminal case, subject to review by this Court via certiorari. Jurisdiction of this Court is invoked under Title 28, USCA, Sec. 1257 and Rule 22 of this Court.

STATUTES INVOLVED.

Rule 14, Federal Rules of Criminal Procedure, 18 USCA, page 335.

The Due Process Clause and the Equal Protection of the Laws Clause of the Constitution of the United States.

ISSUES PRESENTED AND QUESTIONS INVOLVED.

The sole questions presented herein are:

(a) Did the trial Court abuse his discretion in denying the motion by petitioner that separate trials be ordered of certain unrelated counts in the indictment?

(b) The true meaning of Rule 14 as distinguished from Rule 8, of the Federal Rules of Criminal Procedure.

STATEMENT.

This criminal case involves an appeal from a judgment and sentence of conviction after trial by jury in the United States District Court for the Eastern District of Louisiana, New Orleans Division, Hon. Herbert W. Christenberry, Judge presiding.

Petitioner was indicted for use of the mails and false names to defraud, Title 18 USC 1341, 1342. (R. 1.) The indictment originally contained eight counts but one count was dropped on motion of the Government.

In general outline, the alleged frauds may be described as follows:

Petitioner, Lucius J. Breeland, was charged with a scheme to defraud six insurance companies by making the following false representations:

(a) That no accidental death or disability insurance covering Petitioner was in force except that being applied for;

(b) That no disability insurance had ever been cancelled by the insurer;

(c) That Petitioner has received no "compensation" based on sickness or accident nor had he applied for such compensation;

(d) That Petitioner had never been under observation, care or treatment in any hospital or sanitarium;

(e) That Petitioner had never consulted a physician in the ten years previous to his application for insurance;

(f) That Petitioner's correct name was L. J. Berland (instead of Lucius J. Breeland) and that his post office box was 2625, Customhouse Station, New Orleans, Louisiana;

(g) That Petitioner had purchased a certain Volkswagen sedan for a cash price of $1,500.

(h) That Petitioner's insured house which was destroyed by fire on August 4, 1960, contained furni-

ture, clothing and other personal property with a total value of more than $10,000.00.

(i) That the cash value of said house was $15,500.00 and that a payment of $16,800.00 was due under the insurance contract.

(j) That on August 29, 1960, there had been only one insurance claim filed for payment by Globe Life and Accident Company except that which was being sent to the National Motor Club.

The various counts in the indictment purport to be connected with the above schemes to defraud and the various use of the mails cover numerous transmittal of applications, etc., not necessary to detail here. The proof offered by the Government was almost entirely of a circumstantial nature, plus the offer of numerous documents which were of an equivocal nature and the admissibility of some of these were challenged as noted in argument below. A motion by the defense for a verdict of acquittal was denied at the close of the Government's case and was likewise renewed and denied at the close of the entire case. The Petitioner was convicted on the remaining seven counts and was sentenced for a period of three years on each count to run concurrently. (R. 406, 407.)

The motion by petitioner, made alternatively, for a dismissal or election between counts, presents the sole basis of this application for certiorari. We quote

the substance of said motion, filed in advance of trial, as follows: (R. 19)

"The motion of Lucius J. Bréeland, defendant herein, through undersigned counsel, respectfully represents that defendant has been indicted in an indictment of eight counts, one of which (Count VII) the United States Attorney's Office has elected to dismiss.

1.

The first count charges defendant with a violation of 18 USC 1341 and refers to five overt acts alleged to have been committed by defendant on or about November 14, 1959.

2.

Count II charges defendant with a violation of 18 USC 1341 on or about June 22, 1960, and refers to two overt acts alleged to have been committed at that time.

3.

The third count charges defendant with a violation of the same section of the United States Code and refers to two overt acts allegedly committed by defendant on or about July 7, 1960.

4.

The fourth count charges defendant with a violation of the same section of the United States

Code on or about September 12, 1960, and refers to two overt acts alleged to have been committed by defendant at that time.

5.

Count V charges defendant with a violation of the same section of the United States Code on or about September 17, 1960, and refers to one overt act allegedly committed by the defendant at that time.

6.

Count VI charges defendant with a violation of title 18 USC 1341 on or about November 29, 1960, and charges defendant with the commission of two overt acts pursuant thereto.

7.

Count VIII alleges a violation of title 18 USC 1342 on or about July 5, 1960, and alleges one overt act pursuant thereto.

Thus the several counts of the indictment charged defendant with violations of title 18 USC, Sections 1341 and 1342 by the commission of some 15 overt acts over a period of more than twelve months. It is not shown in the indictment that the offenses were interrelated.

The evidence to prove the various counts is necessarily different. The effect of evidence

offered in support of one count, while not relevant to the proof of a different count, would have a confounding effect upon the Jury and make it extremely difficult, it not impossible, for the Jurors to separately evaluate the various offenses and proof in support thereof in their deliberation. The cumulative effect of the government's attempt to prove the separate counts would be unduly prejudicial to the defendant and impose an unreasonable detriment upon him in the preparation and presentation of his defense.

The jurisprudence presents a myriad of factual situations in which the defendant is joined in several counts of an indictment charging related or different offenses. The underlying rule, however, appears to be that a separate trial of counts should be granted if joinder would be prejudicial to the defendant or the government."

REASONS FOR GRANTING THE WRIT.

In refuting the principal issue relied upon by petitioner on appeal, the Fifth Circuit, in a one page Per Curiam (R. 410) relied solely upon one case, its own 1965 decision in *Nixon v. United States*, 352 F. 2d 601, as controlling.

Petitioner respectfully submits that *Nixon, supra,* is simply authority for the proposition that the trial Court has great discretion in matters pertaining to election between counts, a proposition which we

readily concede. But the facts in *Nixon* bear little resemblance to those in the case at bar. *Nixon, supra*, is of no value whatever in resolving whether or not the trial Judge did or did not abuse that discretion. We can only hazard the guess that this citation of the *Nixon* case was the product of subconscious motivation, i.e., that this is an election year and the name Nixon looms large in some minds.

In the *Nixon* case just cited, a deck hand had been convicted of second-degree murder of the captain of a shrimp boat and of assault with intent to murder another deck hand. As to the contention that the two verdicts were INCONSISTENT, the Fifth Circuit, via a panel composed of Judges Rives, Wisdom and Gewin, declared: (at page 602 of 352 F. 2d)

> "Second, the verdicts on the two counts are *not inconsistent*. The record shows that the conviction under each count was sustained by the evidence. . . . THERE IS NO GENERAL REQUIREMENT FOR A SEPARATE TRIAL ON EACH COUNT OF THE INDICTMENT OF A SINGLE OFFENDER FOR MULTIPLE OFFENSES. Rule 8(a), Fed. Rules Crim. Proc.; Griffin v. United States, 5th Cir. 1959, 272 F. 2d 801, opinion corrected and rehearing denied, 1960, 273 F. 2d 958." (Emphasis added.)

Of course, no one contended, either in the trial Court or before the Fifth Circuit, that there was any "general rule" against joining multiple counts

against a single offender. The sole issue on this point was as to the propriety or fairness of forcing this defendant to face multiple charges, of varying factual complexities. Rule 8, Federal Rules of Criminal Procedure, which is the determinative rule in the case of *Griffin v. United States, supra* (another Fifth Circuit case) deals solely with general "ground rules" as to the format of the indictment, i.e., rules pertaining to permissive joinder of offenses in a single indictment and joinder of multiple defendants in a single indictment. The crux of the matter here is covered, not by Rule 8, but by Rule 14, which provides:

RULE 14. RELIEF FROM PREJUDICIAL JOINDER.

> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, *the court may order an election or separate trials of counts*, grant a severance of defendants or provide whatever other relief justice requires."

Petitioner would entertain slight hope of obtaining a writ of certiorari here if the Fifth Circuit, after analyzing the factual situation and the possibility of prejudice presented by reason of our being forced to trial before the same jury under an indictment charging numerous alleged frauds which had nothing in common save that the same defendant was involved in each and one of several insurance companies were involved in each count. But the Fifth Circuit obvious-

ly made no such evaluation. The appellate Court blandly came forth with a pronouncement as to the meaning of Rule 8 when Rule 8 had no more to do with the issue than Ohm's Law. Rule 14 alone was the controlling rule, as was made clear in our brief to the Fifth Circuit. There, on pages six and seven of our brief we stated:

> "A consideration of the evidence adduced at trial shows very clearly the confused situation which was created by trying the seven unrelated counts before the same Jury. For, even conceding, arguendo, that there had been proven fraud as to each count, the fact remains that there was no similarity or continuity of any kind and the only thing in common which the seven counts had was that the same defendant was involved. Here we have a man charged with having perpetrated fraud against six separate insurance companies on various dates, over an extensive period of time and through various means or procedures. Certainly the alleged misrepresentation set forth as to having denied any previous applications for insurance cannot have any logical connection with the charge of having put in a false claim for the loss of household fixtures in a fire. The same may be said as to the lack of any logical connection between the other counts other than the fact that the same defendant is involved in each count. The only thing which the seven counts have in common is that an insurance company is involved. There is no

showing whatever that there was any continuing conspiracy or that the various overt acts all sprung from some initial fraudulent scheme. We submit that even if a man were guilty it would be bad procedure to require him to face trial before the same Jury under a barrage of entirely separate and unrelated frauds. The records show that the resulting confusion was highly prejudicial. For example, as to the count relating to a false claim as to the amount of furniture and fixtures destroyed, there was a complete lack of any evidence worthy of the name to support such charge. On the contrary, the evidence presented by the defense preponderated heavily in favor of innocence. An impressive array of eye-witnesses presented by the defense made it almost impossible for anyone to believe that this count was valid. Nevertheless, the jury convicted him on this count.

We respectively submit that the denial of this motion was highly prejudicial and was in conflict with the following decisions:

Barton v. U. S., 263 F. 2d 894 (Fifth Circuit 1959);
Corcoran v. U. S., 229 F. 2d 295 (Fifth Cir., 1956);
U. S. v. Gross, 329 F. 2d 180 (Fourth Cir., 1964);
Schaeffer v. U. S., 362 U.S. 511, 4 L. Ed. 2d 921, 80 S. Ct. 945 (Supreme Court, 1960).

> Numerous cases on the same point are collected in the Federal Digest, verbo 'Criminal Law', Key Number 622 (1) as well as in the footnotes in Title 18 USCA, Rules of Criminal Procedure, under Rule 14, sub-footnote (2) page 340 and page 136 of the Pocket Part thereof."

Since, therefore, petitioner's plea for relief from a grossly prejudicial procedure, was disposed of under the wrong rule of the Federal Rules of Criminal Procedure, he is considerably more sanguine as to his prospects of relief from this Court. With all due respects to the able members of the Fifth Circuit panel who decided this case, we submit that we were entitled to have the crucial issue disposed of under the proper rule. Basic elements of fair play in any contest demand that the game be played in the scheduled ball park. Here, we submit, in attempting to decide the matter under the wrong Rule the Fifth Circuit is indeed in "the wrong ball park" and, in so doing the Court stands forth as out of place "as a stray lamb in an unfriendly pasture."

To express it in another way, there has apparently been a short circuit in the Fifth Circuit and we respectfully request that corrective measures be taken lest there follow dire results to the jurisprudence. It may well be that, ultimately this Court will decide that the trial Judge did not abuse his discretion. But that matter has not yet been passed upon yet. It has simply been passed.

For the foregoing reasons, petitioner prays that a writ of certiorari issue to the Court of Appeals in the above cause; that the decision below be reversed and a new trial granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, G. Wray Gill, of counsel for petitioners and a member in good standing of the bar of the Supreme Court of the United States hereby certify that a copy of the foregoing petition for certiorari has been served upon opposing counsel, the Solicitor General of the United States and the U.S. Attorney for the Eastern District of La., by mailing same, postage prepaid and properly addressed to their respective offices on July ..., 1968.

G. WRAY GILL.